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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

KURT SCHEUERMAN, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

NESTLE HEALTHCARE NUTRITION, INC.,

Defendant.

CASE No.:

COMPLAINT

CLASS ACTION COMPLAINT FOR
(1) VIOLATION OF NEW JERSEY'S
CONSUMER FRAUD ACT, N.J.
STAT. ANN. §56:8-1 *ET SEQ*; (2)
BREACH OF EXPRESS
WARRANTY

JURY TRIAL DEMANDED

Plaintiff, Kurt Scheuerman, by and through his attorneys, brings this action on behalf of himself and all others similarly situated against defendant Nestle Healthcare Nutrition, Inc. ("Nestle"). The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332(d)(2). Plaintiff alleges, on information and belief, except for information based on personal knowledge, as follows:

ALLEGATIONS PURSUANT TO LOCAL CIVIL RULE 10.1

1. The names and addresses of the parties are as follows:

- a. Plaintiff Kurt Scheuerman resides at 7741 Albright Avenue, Elkins Park, PA 19027; and
- b. Defendant Nestle Healthcare Nutrition, Inc. is headquartered at 12 Vreeland Road, Florham Park, NJ 07932-0697.

JURISDICTION AND VENUE

2. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000 and members of the class of plaintiffs are citizens of a state different from defendant.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 in that many of the acts and transactions giving rise to this action occurred in this district and because defendant:

- a. is authorized to conduct business in this district and has intentionally availed itself of the laws and markets within this district through the promotion, marketing, distribution and sale of its products in this district;
- b. does substantial business in this district; and
- c. is subject to personal jurisdiction in this district.

NATURE OF THE ACTION

4. Nestle labeled, advertised, promoted, offered for sale, sold and distributed a meal replacement beverage for children ages 1-13 called BOOST Kids Essentials¹ (the “Product”).

5. In an extensive nationwide marketing campaign, Nestle states that it is “clinically show[n]” that the Product provides children with health benefits that other meal replacement beverages do not.

6. Nestle’s representations are false, misleading and reasonably likely to deceive the public.

7. Since the launch of the Product in January 2008, the label and the Product’s other advertisements stated that it provided “Immunity Protection” through its “Patented” straw lined with “Probiotics.”

8. Nestle claimed, among other things, that it was “clinically shown” that the Product could reduce illness in children, protect them from colds and flu by strengthening the immune system, and to help children up to age 13 recover more quickly from diarrhea.

9. Nestle’s nationwide advertising campaign, emanating from its headquarters in New Jersey, included among other things, magazines, newspapers, direct-mail, television, internet, and point of sale displays. Nestle also advertised the false claims on the Product’s labels.

¹ In various advertisements, Nestle also referred to the product as “Boost Kid

10. Nestle's false Product claims were designed to induce consumers to buy the Product. Based on the deceptive messages detailed herein, consumers purchased the Product.

11. As a result of the misleading message conveyed through this campaign, Nestle has been able to rapidly gain market share in this segment over other meal replacement products, charge a premium for its Product, and generate millions of dollars in sales.

12. Plaintiff brings this action on behalf of himself and other similarly situated consumers in the United States to correct the false and misleading perception Nestle has created in the minds of consumers, and to obtain redress for those who have purchased the Product. Plaintiff alleges violations of the New Jersey Consumer Fraud Act ("CFA") and breach of the express warranty created by its advertising, including its labeling.

PARTIES

13. Plaintiff Kurt Scheuerman was at all relevant times and is a resident of Montgomery County, Pennsylvania. During the Class period, plaintiff Scheuerman was exposed to and saw Nestle's claims and purchased the Product in reliance on these claims.

14. Defendant Nestle is a Delaware corporation headquartered in Florham Park, NJ. Nestle conducts substantial business activities in New Jersey. Nestle markets,

Essentials."

distributes and sells the Product throughout New Jersey and the United States. Nestle's advertising and representations about the Product made to consumers is conceived, reviewed, approved or otherwise controlled from its headquarters in New Jersey.

FACTUAL ALLEGATIONS

Nestle's Claims About BOOST Kids Essentials

15. In January 2008 Nestle began promoting BOOST Kids Essentials utilizing various media outlets, including, but not limited to, print advertisements, internet websites, television, as well as on its label.

16. Nestle's marketing claim that BOOST Kids Essentials "has been clinically shown to help strengthen the immune system when consumed daily," and that drinking BOOST Kids Essentials:

- a. prevents upper respiratory tract infections in children;
- b. strengthens immune systems, thereby providing protection against cold and flu viruses; and
- c. reduces absences from daycare or school due to illness.

17. A typical television commercial is summarized as follows. A copy of the story board is attached hereto as Exhibit A and incorporated by reference herein.

(A girl pops into frame and takes a big enjoyable sip of Kids Essentials.).

Female Announcer: "Introducing NEW BOOST Kids Essentials, the only nutritionally complete drink that gives kids the power of immune strengthening probiotics."

ON SCREEN: *L. reuteri Protectis* has been clinically shown to help strengthen the immune system when consumed daily. For more information about clinical trials involving *L. reuteri Protectis*, go to www.kidessentials.com.

(The girl runs along playfully as the straw twirls around her. She encounters a boy who sneezes. The straw quickly forms a protective barrier around her. The girl continues on her way and as she approaches a basketball net, the straw forms stairs for her to step up on.)

ON SCREEN: muscle-building protein

Female Announcer: “Plus the power to grow strong – with muscle-building protein and 25 vitamins and minerals.”

(She takes a shot and hits a perfect swoosh.)

ON SCREEN: 25 vitamins & minerals

(Cut to straw popping back into drink box. The vortex of wellness swirls around the box, highlighting product attributes.)

ON SCREEN: Immunity strengthening probiotics/7 g protein/25 vitamins & minerals. (emphasis added).

Female Announcer: “NEW BOOST Kids Essentials: complete nutrition for your child’s healthy growth, and probiotics clinically shown to help strengthen the immune system.” (emphasis added).

(The straw bends forwards, and probiotics titles emerge, followed by animated probiotic bubbles and a twirling arrow.)

ON SCREEN: Probiotic straw/Clinically shown to help strengthen the immune system. (emphasis added).

(Close up of the girl grabbing the drink box and enjoying another sip)

Female Announcer: And that means the power to do anything is possible every day.

(She finishes her sip, turns and skips out of frame.)

ON SCREEN: BOOST Kid Essentials Nutritionally Complete Drink
KidEssentials.com....

18. On every label of BOOST Kids Essentials, Nestle claimed that the product provided “Immunity Protection*,” was “Nutritionally Complete Drink with PROBIOTICS to Help Keep Kids Healthy,” and a “Patented PROBIOTIC straw.”

19. On the side of the packaging label, the Nestle made the following claims:

Complete, Balanced Nutrition for Your Child’s
Healthy Growth and Strong Immune System!

BOOST ®Kid Essentials provides complete, balanced nutrition for kids 1-13.

Only BOOST Kid Essentials has the vitamins and minerals kids need plus immune-supporting probiotics and antioxidants to help keep them healthy!...

Talk to your pediatrician about using BOOST Kid Essentials as a supplement with a meal or as a snack. To learn more about immunity, probiotics, and antioxidants, visit www.kidessentials.com...

A copy of the Product labeling is attached hereto as Exhibit B, and is incorporated herein by reference.

20. On Nestle’s internet website, www.kidssentials.com, Nestle made the following claims under the “FAQ” section:

Q: What exactly do probiotics protect my kids from?

A: Probiotics are healthy bacteria that must be consumed in order to build up in our digestive system - in the lining of the GI tract. While they occur throughout nature, they are less likely to be present in large numbers in our own GI tract, and therefore need to be consumed to derive a benefit. They

help balance and keep the levels of bad bacteria in check. Most importantly, they help keep our immune system healthy by increasing disease-fighting antibodies.^{1,2}

References:

1. Tuohy KM et al. Using probiotics and prebiotics to improve gut health. DDT 2003;8(15):692-700.
2. Isolauri E et al. Probiotics: effects on immunity. Am J Clin Nutr 2001;73(suppl):440S-50S.

Q: Are probiotics effective against viruses?

A: Yes, certain probiotics have been shown to help fight viruses such as Rotaviral diarrhea.¹ *Lactobacillus reuteri Protectis* (the probiotic found in BOOST Kid Essentials Drink) has been shown to reduce the duration of diarrheal illness in children³ and reduce the number of days that infants miss daycare due to illness.²

References:

1. Szajewska H et al. Probiotics in gastrointestinal diseases in children: hard and not-so-hard evidence of efficacy. *J Pediatr Gastroenterol Nutr* 2006;42 (5):454-75.
2. Weizman Z et al. Effect of a probiotic infant formula on infections in child care centers: comparison of two probiotic agents. *Pediatrics* 2005;115:5-9.
3. Shornikova AV et al. Bacteriotherapy with *Lactobacillus reuteri* in rotavirus gastroenteritis. *Pediatr Infect Dis J*. 1997;16:1103-7.

Q: Are probiotics safe for my young child?

A: Absolutely. The safety and efficacy of probiotic use has been documented for 100 years all around the world. Probiotic supplemented infant formula has been available for over 15 years, in over 30 countries. *Lactobacillus reuteri Protectis* specifically has been thoroughly tested in infants, children and adults and has shown to be safe and effective.

A copy of Nestle's FAQ is attached hereto as Exhibit C, and is incorporated herein by reference.

21. In a pamphlet Nestle distributed to consumers and health care professionals

Nestle made the following claims:

Front Cover:

The essential facts: a comparison of **BOOST® Kid Essentials**

Nutritionally

Complete Drink with probiotic immunity protection vs. **PediaSure®.***

Only BOOST Kid Essentials Drink provides immune-supporting probiotics in its patented straw to help keep kids healthy....

(emphasis in original).

Inside Pamphlet:

....**The immunity support every kid needs.**

Only BOOST® Kids Essentials Nutritionally Complete Drink delivers ***immunity-supporting probiotics***. PediaSure® does not.

Clinical studies of *L. reuteri Protectis* showed the following:

Faster Resolution of Acute Diarrhea In Young Children

[Depiction of a bar graph showing that 81% of patients in a control group had watery diarrhea compared with 26% of patients in the treatment group on day 2 of treatment]

Adapted from Shornikova *et al.*

Fewer Absences Among Infants From Child Care

[Depiction of a graph showing a 67% relative risk reduction of absences among infants from child care]

Adapted from Weizman *et al.*

Fewer Days with Fever Among Infants Faster Resolution of Acute Diarrhea In Young Children

[Depiction of a bar graph showing that 81% of patients in a control group had watery diarrhea compared with 26% of patients in the treatment group on day 2 of treatment]

Adapted from Shornikova *et al.*

Fewer Absences Among Infants From Child Care

[Depiction of a graph showing a 67% relative risk reduction of absences among infants from child care]

Adapted from Weizman *et al.*

Fewer Days with Fever Among Infants

[Depiction of a graph showing a 79% relative risk reduction of days of fever among infants]

Adapted from Weizman *et al.*

(emphasis in original)

Back Cover:

Strong growth and immunity protection every child deserves....

Only BOOST Kid Essentials Drink's patented straw offers the immune support of the probiotic *L. reuteri Protectis*. Studies in *L. reuteri Protectis* demonstrate the ability to support the body's defenses, resulting in reduced sick days, fever, and the duration of diarrhea....

1. Shornikova A *et al.* *Lactobacillus reuteri* as a therapeutic agent in acute diarrhea in young children. *JPGN* 1997;24(4):399-404.

2. Weizman Z *et al.* Effect of a Probiotic Infant Formula on Infections in Child Care Centers: Comparison of Two Probiotic Agnes. *Pediatrics* 2005;115(1):5-9.

A copy of the pamphlet is attached hereto as Exhibit D, and is incorporated herein by reference.

22. Nestle made similar claims in print advertisements in magazines. For example, in *People Magazine*, Nestle made the following claims:

First Page:

Do your kids have the power?

[Depiction of BOOST Kid Essentials package with the probiotic straw, which reads:

NEW!

BOOST

Kid Essentials

Nutritionally Complete Drink

Immunity Protection*

Patented PROBIOTIC Straw

*Nutritionally Complete Drink with PROBIOTICS to Help Keep Kids Healthy]

Second Page:

The power of immune-strengthening probiotics^{1, 2}

Probiotic straw to help keep kids healthy

[Depiction of the probiotic straw (continued from the previous page) forming a complete circle around a girl, while a boy sneezes in her direction]

1. Weizman Z et al. Effect of a Probiotic Infant Formula on Infection in Child Care Centers: Comparison of Two Probiotic Agents. *Pediatrics* 2005; 115(1) 5-9.

2. Shornikova AV et al. Lactobacillus reuteri as a therapeutic agent in acute diarrhea in young children. *JPGN* 1997;24(4):399-404.

Third Page:

The power to grow strong

25 vitamins & minerals

7g of muscle-building protein

[Depiction of the probiotic straw (continued from the previous page) forming stairs for the girl to climb, as she tosses a basketball into a basketball hoop]

Fourth Page:

The power
to do anything!
Every day.

NEW BOOST® Kid Essentials
Nutritionally Complete Drink:

- Immune-strengthening probiotics in the straw
- 25 vitamins & minerals + 7g of protein to support healthy growth
- Kid preferred taste vs. Pediasure®...

A copy of the *People Magazine* print advertisement is attached hereto as Exhibit E, and is incorporated herein by reference.

Nestle's Claims About BOOST Kids Essentials Are False and Misleading

23. Nestle's claims about the health benefits of the Product is false and made without a reasonable basis.

24. According to a complaint drafted by the U.S. Federal Trade Commission (the "FTC") and revealed to the public on July 14, 2010, contrary to Nestle's assertions about clinical studies supporting their claims about the Product, "clinical studies do not prove that drinking BOOST Kid Essentials reduces the general incidence of illness in children, including respiratory tract infections, reduces the duration of acute diarrhea in children up to the age of thirteen, or strengthens the immune system, thereby providing protection against cold and flu viruses." Therefore, the FTC concluded that any such representations by Nestle "were, and are, false and misleading."

25. The FTC complaint also states that Nestle had no reasonable basis that substantiated its claims that drinking the Product would: (a) prevent upper respiratory infections in children; (b) strengthen immune systems, thereby providing protection

against cold and flu viruses; and (c) reduce absences from daycare or school due to illness.

26. According to an announcement issued by the FTC on July 14, 2010, Nestle agreed to resolve the claims in the FTC complaint through an entry of a proposed consent order. The proposed consent order is currently open for public comment until August 16, 2010, after which the FTC will decide whether to make it final.

27. According to the proposed consent order, Nestle has agreed not to represent in any manner that BOOST Kids Essentials:

- a. “prevents or reduces the risk of upper respiratory tract infections, including, but not limited to, cold or flu viruses, unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990”; and
- b. “[r]educes the duration of acute diarrhea in children up to the age of thirteen; or reduces absences from daycare due to illness unless the representation is non-misleading and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true.”

28. Nestle also agreed not to make any representations about the health performance, benefits, and efficacy, of the Product unless such representations are not misleading at the time made and Nestle relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

CLASS ACTION ALLEGATIONS

29. Plaintiff brings this lawsuit on behalf of himself and the proposed Class members under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The proposed Class consists of:

All persons who purchased in the United States BOOST Kids Essentials. Excluded from the Class are defendant's officers, directors and employees and those who purchased the Products for the purpose of resale.

30. The Class comprises many tens of thousands of consumers throughout New Jersey and the United States. The Class is so numerous that joinder of all members of the Class is impracticable. There are questions of law and fact common to the Class. The common questions include:

- a. whether Nestle had adequate substantiation for its Product claims prior to making them;
- b. whether the Product claims discussed above are true, or are misleading or reasonably likely to deceive;

- c. whether Nestle's conduct violates public policy;
- d. whether the alleged conduct constitutes violations of the laws asserted herein;
- e. whether Nestle engaged in false or misleading advertising;
- f. whether plaintiff and the Class members sustained monetary or other loss and the proper measure of that loss;
- g. whether plaintiff and Class members are entitled to an award of punitive damages; and
- h. whether plaintiff and Class members are entitled to declaratory or injunctive relief.

31. Plaintiff's claims are typical of the claims of the proposed Class, and plaintiff will fairly and adequately represent and protect the interests of the proposed Class. Plaintiff does not have any interests antagonistic to those of the Class. Plaintiff has retained competent counsel experienced in the prosecution of this type of litigation.

32. The questions of law and fact common to the Class members, some of which are set out above, predominate over any questions affecting only individual Class members.

33. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation

would make it impracticable or impossible for proposed Class members to prosecute their claims individually. The trial and the litigation of plaintiff's claims are manageable.

34. Unless a class is certified, defendant will retain monies received as a result of its conduct that was taken from plaintiff and proposed Class members.

Notice to Attorney General of Action

35. Pursuant to N.J. Stat. Ann. §56:8-20, a copy of this Complaint has been mailed to the Attorney General, Administrators, Commissioners, or other officers, as required by law, upon and at the time of the filing of the Complaint

COUNT I

Violation of New Jersey Consumer Fraud Act

N.J. Stat. Ann. §56:8-1 et. seq.

36. Plaintiff repeats and realleges the allegations of the preceding paragraphs as if fully set forth herein.

37. The CFA was enacted and designed to protect consumers against unfair, deceptive and fraudulent business practices. N.J. Stat. Ann. §56:8-1 et. seq.

38. N.J. Stat. Ann. §56:8-2 provides:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice

39. Plaintiff, other members of the Class, and Nestle are "persons" within the meaning of the CFA.

40. The Products manufactured and sold by Nestle are "merchandise" within the meaning of the CFA, and plaintiff and other members of the Class are "consumers" within the meaning of the CFA and thus entitled to the statutory remedies made available in the CFA.

41. Defendant, through its advertisements, used unconscionable commercial practices, deception, fraud, false pretense, false promise, and misrepresentation in violation of the CFA in connection with the marketing of the Products, as alleged above.

42. Nestle also knowingly concealed, suppressed and consciously omitted material facts to plaintiff and other members of the Class knowing that consumers would rely on the advertisements and packaging to purchase the Products.

43. The foregoing acts, omissions and practices directly, foreseeably and proximately caused plaintiff and other members of the Class to suffer an ascertainable loss in the form of, *inter alia*, monies spent to purchase the Products, which did not contain advertised health benefits.

44. Plaintiff and the Class expended money for the Product and did not receive the promised health benefits.

45. Plaintiffs and the Class would not have purchased the Product, but for the promised health benefits. Without the health benefits, the Product had no intrinsic value and was worth much less than the price Plaintiff and the Class paid for the Product.

46. Plaintiff and the Class were damaged in the amount of their purchases of Product. Plaintiff and Class members are entitled to recover such damages, together with appropriate penalties, including treble damages, attorneys' fees and costs of suit.

47. The CFA is, by its terms, a cumulative remedy, such that remedies under its provisions can be awarded in addition to those provided under separate statutory schemes.

COUNT II

Breach of Warranty

48. Plaintiff realleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth here.

49. Plaintiff, and each member of the Class, formed a contract with defendant at the time plaintiff and the other members of the Class purchased the Product. The terms of that contract include the promises and affirmations of fact made by Nestle on its Product labels and through its marketing campaign, as described above. This product labeling and advertising constitutes express warranties, became part of the basis of the bargain, and is part of a standardized contract between plaintiff and the members of the Class on the one hand, and Nestle on the other.

50. All conditions precedent to Nestle's liability under this contract have been performed by plaintiff and the Class.

51. Nestle has breached the terms of this contract, including the express warranties, with plaintiff and the Class by not providing the product which could provide the benefits described above.

52. As a result of Nestle's breach of its contract, plaintiff and the Class have been damaged in the amount of the purchase price of the Products they purchased.

PRAYER FOR RELIEF

53. Wherefore, plaintiff prays for judgment:
- a. Certifying the Class as requested herein;
 - b. Awarding plaintiff and the proposed Class members damages;
 - c. Awarding restitution and disgorgement of Nestle's revenues to plaintiff and the proposed Class members;
 - d. Awarding declaratory and injunctive relief as permitted by law or equity, including enjoining defendant from continuing the unlawful practices as set forth herein, and directing defendant to identify, with Court supervision, victims of its conduct and pay them restitution and disgorgement of all monies acquired by defendant by means of any act or practice declared by this Court to be wrongful;
 - e. Awarding plaintiff and the Class punitive damages;
 - f. Ordering Nestle to engage in a corrective advertising campaign;
 - g. Awarding attorneys' fees and costs; and

h. Providing such further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all causes of action so triable.

Dated: July 22, 2010

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

A handwritten signature in dark ink, appearing to read 'La Rosen', is written over a horizontal line.

Laurence Rosen, Esq.

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Counsel for Plaintiff

EXHIBIT A

Straw Power :30 (location)

1/3

1



A girl pops into frame and takes a big enjoyable sip of Kid Essentials.

V/O: "Introducing NEW Boost Kid Essentials..."

2



She is amazed as the straw takes on a life of it's own, jumping out of the drink box and twirling around her head.

V/O: "...the only nutritionally complete drink..."

3



The girl runs along playfully as the straw twirls around her.

V/O: "...that gives kids..."

4



She encounters a boy who sneezes. The straw quickly forms a protective barrier around her.

LEGAL TITLE: L. reuteri Protectis has been clinically shown to help strengthen the immune system when consumed daily. For more information about clinical trials involving L. reuteri Protectis, go to www.kidessentials.com

V/O: "...the power of immune strengthening probiotics."

Straw Power :30 (location)

2/3

5



The girl continues on her way and as she approaches a basketball net, the straw forms stairs for her to step up on.

TITLE: Muscle-building protein

V/O: "PLUS the power to grow strong - with muscle-building protein..."

6



She takes a shot and hits a perfect swoosh.

TITLE: 25 vitamins & minerals

V/O: "...and 25 vitamins & minerals."

7



Cut to straw popping back into drink box. The vortex of wellness swirls around the box, highlighting product attributes.

TITLES: Immunity-strengthening probiotics / 7 g protein / 25 vitamins & minerals

V/O: "NEW Boost Kid Essentials: complete nutrition for your child's healthy growth..."

8



The straw bends forwards, and probiotics titles emerge, followed by animated probiotic bubbles and a twirling arrow.

TITLES: Probiotic straw / Clinically shown to help strengthen the immune system

V/O: "...and probiotics clinically shown to help strengthen the immune system."

Straw Power :30 (location)

3/3

8



Cut to close-up of the girl grabbing the drink box and enjoying another sip

V/O: "...So the power to do anything..."

9



She finishes her sip, turns and skips out of frame...

V/O: "...is possible every day."

10



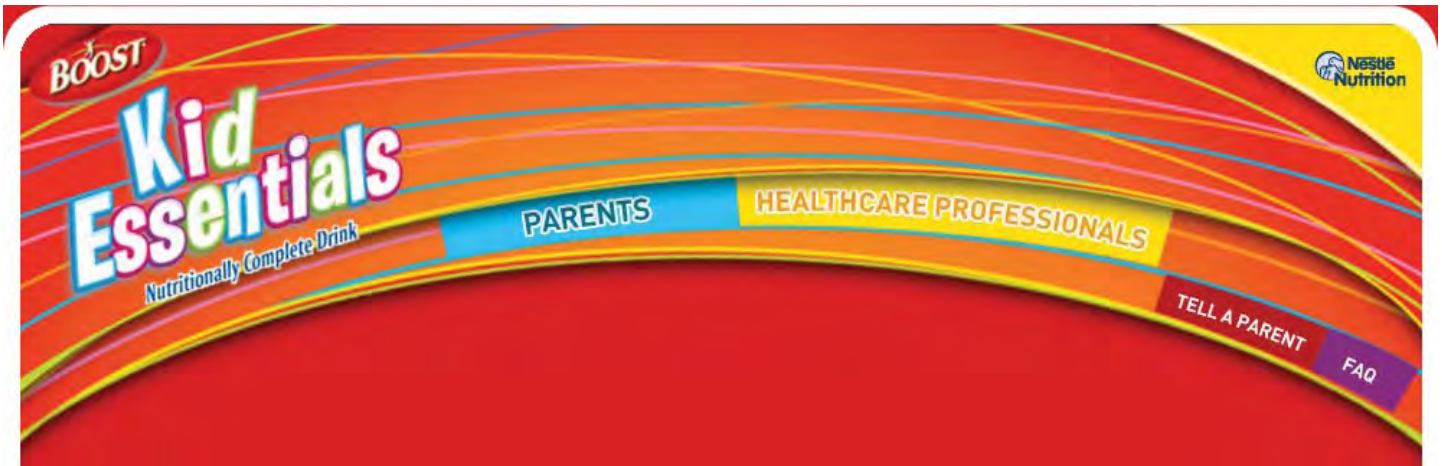
....revealing the logo and website.

V/O: "Look for us next to PediaSure."

LEGAL TITLE: To find out more, talk to your pediatrician.

EXHIBIT B

EXHIBIT C



FAQ

Q: Is BOOST® Kid Essentials Nutritiously Complete Drink a meal replacement?

A: Making healthy food choices and eating proper meals is always recommended; however, BOOST Kid Essentials Drink is an excellent alternative when a meal replacement is required. Each serving of BOOST Kid Essentials Drink provides 244 calories, 25 essential Vitamins and Minerals and 7 grams of muscle-building protein. Talk to your pediatrician about healthy eating and meal replacements.

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Q: When is it most beneficial to take probiotics?

A: To gain the most benefits from probiotics, they should be consumed on a daily basis. By taking them regularly, probiotics are able to live in, or "colonize" the digestive tract and fight off bad bacteria. If your child has stomach problems, such as diarrhea caused by antibiotics, probiotics may help rebuild a healthy colony of good bacteria, which can aid the immune system when your child may need it most.¹⁻³

References:

1. Szajewska H *et al.* Probiotics in gastrointestinal diseases in children: hard and not-so-hard evidence of efficacy. *J Pediatr Gastroenterol Nutr* 2006; 42(5):454-75.
2. Tuohy KM *et al.* Using probiotics and prebiotics to improve gut health. *DDT* 2003; 8(15):692-700.
3. Isolauri E *et al.* Probiotics: effects on immunity. *Am J Clin Nutr* 2001; 73(suppl):440S-50S.

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Q: What exactly do probiotics protect my kids from?

A: Probiotics are healthy bacteria that must be consumed in order to build up in our digestive system -in the lining of the GI tract. While they occur throughout nature, they are less likely to be present in large numbers in our own GI tract, and therefore need to be consumed to derive a benefit. They help balance and keep the levels of bad bacteria in check. Most importantly, they help keep our immune system healthy by increasing disease-fighting antibodies.^{1,2}

References:

1. Tuohy KM *et al.* Using probiotics and prebiotics to improve gut health. *DDT* 2003; 8(15):692-700.
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Q: Are probiotics effective against viruses?

A: Yes, certain probiotics have been shown to help fight viruses such as Rotaviral diarrhea.¹ *Lactobacillus reuteri* *Protectis* (the probiotic found in BOOST Kid Essentials Drink) has been shown to reduce the duration of diarrheal illness in children³ and reduce the number of days that infants miss daycare due to illness.²

References:

1. Szajewska H *et al.* Probiotics in gastrointestinal diseases in children: hard and not-so-hard evidence of efficacy. *J Pediatr Gastroenterol Nutr* 2006; 42(5):454-75.
2. Weizman Z *et al.* Effect of a probiotic infant formula on infections in child care centers: comparison of two probiotic agents. *Pediatrics* 2005; 115:5-9.
3. Shornikova AV *et al.* Bacteriotherapy with *Lactobacillus reuteri* in rotavirus gastroenteritis. *Pediatr Infect Dis J*. 1997; 16:1103-7.

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Q: Are probiotics safe for my young child?

A: Absolutely. The safety and efficacy of probiotic use has been documented for 100 years all around the world. Probiotic-supplemented infant formula has been available for over 15 years, in over 30 countries. *Lactobacillus reuteri* *Protectis* specifically has been thoroughly tested in infants, children and adults and has shown to be safe and effective.

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Q: Why do I need to use the straw that is attached to the package?

A: Only BOOST Kid Essentials Drink delivers immune-supporting probiotics – and the straw is the only way to get them. If BOOST Kid Essentials Drink isn't served with the straw, your child won't receive the immune benefits from the probiotics.

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Q: Can I re-use the BOOST Kid Essentials Drink straw?

A: No. The probiotics are in the straw. They are consumed along with the BOOST Kid Essentials Drink. Re-using the straw will not provide the benefits of probiotics.

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Q: How do antioxidants help my child?

A: Antioxidants help kids fight the damaging effects of free radicals in their young, growing bodies. These immune-supporting agents can help kids fight off sickness at school, the playground, at home, or anywhere on-the-go.

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Q: Where can I find BOOST Kid Essentials Drink?

A: BOOST Kid Essentials Drink is available at your local grocery, discount or drug store.

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Q: Can I heat BOOST Kid Essentials Drink to make a drink like hot chocolate?

A: The immune support offered by the probiotic straw is most effective when BOOST Kid Essentials Drink is chilled, or remains under [77 degrees F]. Store BOOST Kid Essentials Drink in the fridge to maximize the immune benefits and to make it a refreshing treat. And remember, drinking hot beverages through a straw is not advised because your child may burn his or her throat or fingers.

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Q: Is BOOST Kid Essentials Drink lactose-free?

A: Yes.

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Q: My child is already a healthy eater. Is BOOST Kid Essentials Drink still beneficial?

A: Yes, the complete nutrition and probiotic immunity support found in BOOST Kid Essentials Drink provides benefits for most any child. To learn more, [click here](#).

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Q: My child is a picky eater, how can BOOST Kid Essentials Drink help?

A: BOOST Kid Essentials Drink offers a delicious option with complete nutrition and probiotic immunity support for even the pickiest eaters. To learn more, [click here](#).

[Back to top](#)

Q: My child is lagging behind on the growth curves, how can BOOST Kid Essentials Drink help?

A: As a nutritious and delicious snack or meal, BOOST Kid Essentials Drink helps provide a proper balance of key nutrients growing kids need. To learn more, [click here](#).

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Q: Is BOOST Kid Essentials Drink an energy drink?

A: No. Energy drinks typically contain some type of stimulant, such as caffeine or ginseng, along with high levels of sugar. BOOST Kid Essentials Drink provides the complete nutrition that children need without stimulants or large amounts of sugar.

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Q: Is BOOST Kid Essentials Drink kosher?

A: At this time, BOOST Kid Essentials Drink is not certified as kosher.

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Q: Do BOOST Kid Essentials Drink contain gluten?

A: No, BOOST Kid Essentials Drink is gluten free.

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Q: How many times a day can my child drink BOOST Kid Essentials Drink?

A: BOOST Kid Essentials Drink may be consumed with meals, or as a snack, and may therefore be consumed more than once per day. In order to make sure a child receives nutrition from a variety of sources, you may wish to limit daily intake to 2-3 servings. Speak with your pediatrician for more detail regarding how frequently your child may wish to use BOOST Kid Essentials Drink.

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Q: Does BOOST Kid Essentials Drink contain the recommended daily levels of key nutrients like iron and calcium?

A: BOOST Kid Essentials Drink provides 100% or more of the NAS-Recommended Dietary Allowances (RDA's) for protein, vitamins and minerals:

In 1000 mL (approx. 34 fl. oz.) for children 1-8 years of age*

In 1500 mL (approx. 51 fl. oz.) for children 9-13 years of age*

* 100% of the RDA for children 4-8 years of age for vitamins B6 and K is provided in 1500 mL

Not intended for infants under 1 year of age

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Q: Is there sugar in BOOST Kid Essentials Drink?

A: BOOST Kid Essentials Drink contains sugar but no high-fructose corn syrup.

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Q: What are the benefits of no high fructose corn syrup?

A: High fructose corn syrup has been linked to the recent rise in obesity.* That's why it's usually not considered an ideal alternative to other more natural sweeteners such as sucrose.

*Bray GA. Consumption of high-fructose corn syrup in beverages may play a role in the epidemic of obesity. *AJCN*. 2004;79:537-543.

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Q: Is BOOST Kid Essentials Drink appropriate for children with diabetes?

A: According to the American Dietetic Association and the American Diabetic Association, individuals with diabetes may consume some sugar, and primarily need to be aware of their total carbohydrate intake. BOOST Kid Essentials Drink provides 33 grams of carbohydrate, which is the equivalent of 2 slices of bread. Speak with your child's healthcare provider regarding how to incorporate BOOST Kid Essentials Drink into a carbohydrate counting or diabetic meal plan.

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Q: Is BOOST Kid Essentials Drink available through the WIC program?

A: BOOST Kid Essentials Nutritionally Complete Drink (retail) is a WIC eligible medical food for the medical condition of failure to thrive. The WIC approval for institutional* BOOST Kid Essentials Nutritionally Complete Drink is still pending.

*Healthcare Facilities

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*TWIC is a registered trademark of the US Department of Agriculture and an abbreviation for the Special Supplemental Nutrition Program for Women, Infants and Children.

EXHIBIT D

The essential facts: a comparison of
**BOOST® Kid Essentials Nutritionally
Complete Drink** with probiotic
immunity protection vs. **PediaSure®.***

**Only BOOST Kid Essentials Drink provides
immune-supporting probiotics** in its patented
straw to help keep kids healthy.

BOOST Kid Essentials Drink provides complete,
balanced nutrition for children ages 1 to 13
with **25** essential vitamins & minerals, **7** grams
of muscle-building protein, and antioxidants.

Plus new BOOST Kid Essentials Drink contains
more of 15 key vitamins and minerals than PediaSure.



PediaSure® is a registered trademark
of Abbott Laboratories.

* Based upon calorically
equivalent comparison.



The nutritional advantage every kid deserves.

New BOOST® Kid Essentials Nutritionally Complete Drink contains *more of 15 key vitamins and minerals* than PediaSure®:

Nutrient	Unit	BOOST Kid Essentials Drink per 100 ml	PediaSure per 100 ml
ENERGY	kcal	100.0	101.0
PROTEIN	g	3.0	3.0
FAT	g	3.8	3.8
CARBOHYDRATES	g	13.5	13.0
VITAMIN A	IU	274.6 [*]	169.0
VITAMIN D	IU	61.5	50.6
VITAMIN E	IU	3.2	2.5
VITAMIN C	mg	12.7	10.1
FOLIC ACID	mcg	41.0	33.8
THIAMIN	mg	0.3	0.3
RIBOFLAVIN	mg	0.2	0.2
NIACIN	mg	1.7	0.8
VITAMIN B6	mg	0.3	0.3
VITAMIN B12	mg	0.6	0.3
BIOTIN	mcg	32.0	19.0
PANTOTHENIC ACID	mg	1.0	1.1
VITAMIN K	mcg	4.0	6.8
CHOLINE	mg	41.0	34.8
CALCIUM	mg	118.9	105.5
PHOSPHORUS	mg	90.2	84.4
IODINE	mcg	11.9	9.5
IRON	mg	1.4	1.5
MAGNESIUM	mg	19.7	16.9
COPPER	mg	0.1	0.1
MANGANESE	mg	0.2	0.2
ZINC	mg	1.2	0.6
CHLORIDE	mg	61.5	114.8
POTASSIUM	mg	110.7	156.1
SODIUM	mg	61.5	38.0
CHROMIUM	mcg	6.1	7.6
SELENIUM	mcg	4.1	3.0
MOLYBDENUM	mcg	4.5	3.2

* Based upon calorically equivalent comparison.

† Includes Vitamin A activity from beta carotene.

Data on BOOST Kid Essentials Nutritionally Complete Drink as of July 2008.
Chocolate flavor comparison – PediaSure information from PediaSure.com;
August 11, 2008.

BOOST Kid Essentials Drink – a good source of antioxidants:
Vitamins C, E, and selenium.

The immunity support every kid needs.

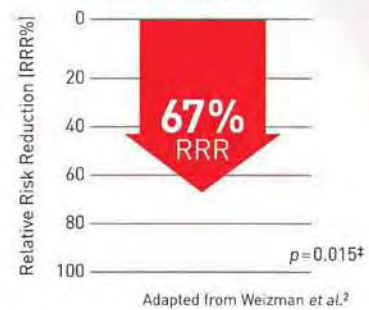
Only BOOST® Kid Essentials Nutritionally Complete Drink delivers *immunity-supporting probiotics*. PediaSure® does not.

Clinical studies of *L. reuteri* Protectis showed the following:

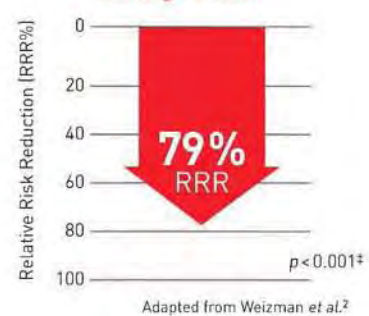
Faster Resolution Of Acute Diarrhea In Young Children



Fewer Absences Among Infants From Child Care



Fewer Days With Fever Among Infants



Δ By the second day of treatment, only 26% of subjects receiving *L. reuteri* had watery diarrhea vs. 81% of the placebo group.

‡ *L. reuteri* vs. controls.

Strong growth and immunity protection every child deserves.

Recommend BOOST® Kid Essentials Nutritionally Complete Drink for your patients 1-13 years of age who are:

- Diagnosed as Failure to Thrive
- Picky Eaters
- Active High Achievers.

Only BOOST Kid Essentials Drink's patented straw offers the immune support of the probiotic *L. reuteri* Protectis.

Studies in *L. reuteri* Protectis demonstrate the ability to support the body's defenses, resulting in reduced sick days, fever, and the duration of diarrhea.^{1,2}

Provides 25 vitamins & minerals and 7 grams of protein.

Available in three kid-approved flavors:
Chocolate • Vanilla • Strawberry



USDA
WIC-eligible

Available at Target®.

Also available at food and drug stores nationwide.
To find the retailer nearest you, please call
Nestlé Nutrition at 1-800-247-7893.

1. Shornikova A *et al.* *Lactobacillus reuteri* as a therapeutic agent in acute diarrhea in young children. *JPGN* 1997;24(4):399-404.
2. Weizman Z *et al.* Effect of a Probiotic Infant Formula on Infections in Child Care Centers: Comparison of Two Probiotic Agents. *Pediatrics* 2005;115(1):5-9.

Visit

KidEssentials.com

for detailed nutritional information



Growing possibilities.



BOKE-10454-1108

EXHIBIT E



Good when she was bad: Sheridan (center) with Neal McDonough and Kathryn Joosten.

3 REASONS I'LL MISS *DESPERATE HOUSEWIVES'* NICOLLETTE SHERIDAN

1 SHE KNEW THE SCORE When Edie Britt exits the show this spring, Sheridan takes with her a special knowing humor. Edie, a smirker, seemed to comprehend just how petty the wives' traumas really are.

2 SHE WAS AN UBER COUGAR Proud poacher of neighbors' husbands and boyfriends, Edie sauntered

around Wisteria Lane in short shorts and tight tops, refusing to cede sexuality to age. Tacky, but defiant.

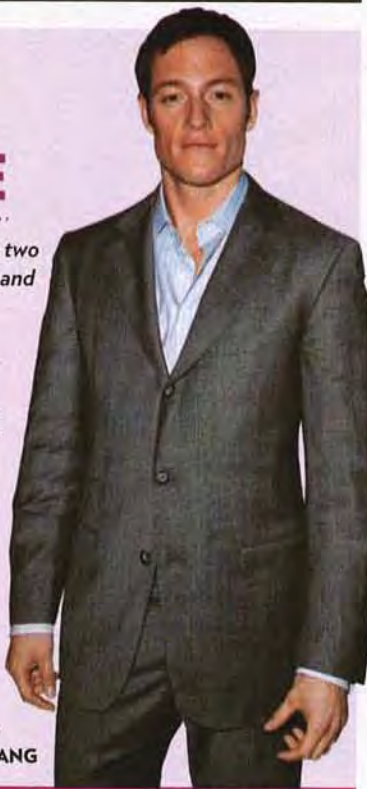
3 SHE TOO WAS DESPERATE—QUIETLY In the end Edie just wanted a little love, usually from the wrong guy (like Neal McDonough, as her crazy spouse). Let's never forget: *Edie* rhymes with *needy*.

TAHMOH PENIKETT WORKING DOUBLE-TIME

The Canadian actor, 33, is juggling two series: *Sci Fi's* *Battlestar Galactica* and the new FOX drama *Dollhouse*.

YOU KICK BUTT ON BOTH SHOWS! I've been practicing this beautiful martial art, Muay Thai, for years. The "jumping knee" is one of my specialties. I'm not Jackie Chan or anything, but it looks pretty cool when a 6'3" dude jumps in the air.

HOW DO YOU LIKE HAVING YOUR OWN BATTLESTAR ACTION FIGURE? It was surreal when it came out. What's funny is all my friends have bought Helo action figures. They've threatened to do some funny things [using] those dolls and put it on YouTube! —CYNTHIA WANG



FROM TOP: RON TOMABIG, SCOTT KIRKLAND/IF

Do your kids
have the
power?





NEW
SEASON!

Tyson Beckford
mentors the male
models, including
Jonathan (left).

Make Me a Supermodel

Bravo, March 4, 10 p.m. ET | ★★☆☆

REALITY

The title has a sort of infantile insistence to it. You want to chide, "Make me a supermodel, *please*." The show itself, though, is a painlessly smooth runway stroll, thanks to the unvarnished attractiveness of its young contestants. It almost seems beside the point to learn that Colin, a college student, is a virgin or that one of the girls—named Salome—has displeased her Mennonite family with her fashion aspirations. In the opening challenge of the second-season premiere, the models are paired off, hoisted far above the ground in a Plexiglas box and told to strike an intimate pose. Make them come down, *now*.

SHE'S BACK TOO!

For the cycle 12 premiere of *America's Next Top Model* (CW, March 4, 8 p.m. ET/PT), Tyra Banks makes her ritualist grand entrance in ancient Greco-Roman costume, proclaiming herself the goddess of fierce. I sometimes wish she'd just ride down an escalator waving. Of the girls in the first hour, the most intriguing are burn victim Tahlia, street preacher London and Allison, who has huge, *Coraline*-like eyes and an unhealthy interest in blood. ★★☆☆



The power of immune-strengthening probiotics^{1,2}

Probiotic straw to help kids stay healthy



1. Research: A lot of research is being done on probiotics to help kids stay healthy.
2. Research: A lot of research is being done on probiotics to help kids stay healthy.
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**NEW
SEASON!**

In the
premiere
Rivers lets
them eat
cupcake.

All proceeds go to charity.

The Celebrity Apprentice

NBC, March 1, 9 p.m. ET | ★★★★★

REALITY

Even if Donald Trump's casinos have hit a rough patch, cheap TV formats can be a resilient investment during a downturn. The second season of his *Apprentice*-with-stars has one major plus going in: no Omarosa. On the other hand, it's hard to imagine how eagerly viewers will root for Claudia Jordan, a briefcase model on *Deal or No Deal*. At least there's Joan Rivers—bullheaded and shrewd, both in business and in comedy. Consider her the show's stimulus package.

MISSY PEREGRYN GRIN REAPER

The actress, 26, is back on the CW comedy after cheering on her boyfriend, Pittsburgh Steelers QB Ben Roethlisberger, at the Super Bowl.

YOUR COSTARS ON REAPER ARE

MOSTLY MEN. It's perfect. Growing up I was a tomboy. I was never emotional and feminine until a few years ago. I'm finally a woman!

YOU PLAY A WAREHOUSE MAN- AGER. EVER WORK IN RETAIL?

I worked at a Sport Chek in Vancouver, only so I could get the discount off snowboard gear. But I hated the job so much, I quit before I got my discount.

WHAT WAS IT LIKE SEEING BEN WIN THE SUPER BOWL?

It was the happiest, most emotional weekend of my life. It felt like I was playing—and I didn't want to lose! —PAUL CHI



The power to grow strong

25 vitamins & minerals

7g of muscle-building protein



The **power**
to do **anything!**
Every day.

NEW BOOST® Kid Essentials
Nutritionally Complete Drink:

- Immune-strengthening probiotics in the straw
- 25 vitamins & minerals + 7g of protein to support healthy growth
- Kid preferred taste vs. Pediasure®[®]



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BOOST
Kid Essentials
Nutritionally Complete Drink

Anything is possible at kidessentials.com

TV



Feeling the Love with Ginnifer Goodwin (left) and Jeanne Tripplehorn.

TV'S FAVORITE POLYGAMIST, **BILL PAXTON,** **BIG MAN ON CAMPUS**

● On the HBO drama *Big Love*, the actor, 53, plays a polygamist with 3 wives and 8 children. But at home it's just wife Louise and kids James, 15, and Lydia, 11.

AFTER SO MANY FILMS, HOW DO YOU LIKE TV? I was so into *The Sopranos* and always wanted to do an ongoing character. It's so original, so keep it coming!

DID YOU FOLLOW THE NEWS ON THE FLDS CULT LAST YEAR? Oh, yeah. When that

happened in Texas, the image of those children being taken away from their mothers; in a weird way our show has given a face to a culture that's so alien to Americans.

DO YOU EVER WATCH YOUR OLD MOVIES? I found a VHS copy of a film I did called *Mortuary*. I showed it to my son and daughter, and we had a good laugh. My son said, "You sure have gotten a lot better!"

ARE YOUR KIDS STAR-STRUCK?

Justin Long was at the *Big Love* premiere; my daughter has seen *Accepted* 100 times. He talked to

her, and it was so cute to see her trying to play it cool, even though she was jumping out of her skin.

—LISA INGRASSIA

